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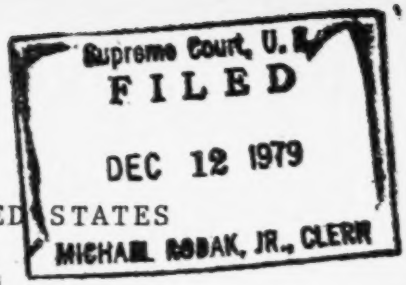

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-

CHLOE WHISKERS, ANNIE CANTSEE, VELMA MILLS, JAMES MILLS, MARSHALL WHYTE, RAYMOND STEWART HATCH, and ANNA MARIE NAT,

Petitioners,

v.

THE UNITED STATES OF AMERICA; CECIL D. ANDRUS, as Secretary of the Interior; and FORREST J. GERARD, as Assistant Secretary of the Interior for Indian Affairs,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit entered in this proceeding on June 14, 1979, and the denial of rehearing on August 14, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 600 F.2d 1332 (10th Cir. 1979) and is printed in the Appendix at page 14a. The opinion of the District Court for the District of Utah is unreported and is printed in the Appendix at page 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1979. A timely motion for rehearing was denied on August 14, 1979. On November 1, 1979, Mr. Justice White granted petitioners' application for an extension of the time for filing a petition for certiorari through December 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether individual Indians who are entitled to share in a claims judgment fund have

a cause of action for damages against the United States, when the Secretary of the Interior fails to make any reasonable effort to notify them of the existence of the fund or enrollment procedures, thereby excluding them from their share of the fund.

STATUTES INVOLVED

1. The Southern Paiute Judgment Distribution Act, Pub.L. 90-584, 82 Stat. 1147 (1968):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of disposing of the sum of $7,253,165.19 appropriated April 20, 1965 (79 Stat. 81, 108, 109), to pay a judgment of the Indian Claims Commission entered in its dockets numbered 88, 330, and 330-A on January 18, 1965, on behalf of the Southern Paiute Nation, the bands and groups of Southern Paiute Indians named in the petitions and the Las Vegas Band together with interest accruing thereon, the Secretary of the Interior shall prepare a roll of all persons who meet the following requirements for eligibility: (a) they were born on or prior to and living on the date of this Act and are (b) enrolled or entitled to be enrolled as members of the Kaibab Band of Paiute Indians of the Kaibab Reservation, Arizona, or (c) enrolled or entitled to be enrolled as members of the Moapa Band of Paiute Indians of the Moapa River Reservation, Nevada, or (d) whose names or the name of a lineal ancestor appears on the final rolls of the Shivwits, Kanosh, Koosharem, and Indian Peaks Bands of Paiute Indians which were prepared pursuant to the Act of September 1, 1954 (68 Stat. 1099), or (e) Southern Paiute Indians whose names of the name of a lineal ancestor appears on the January 1, 1940, census roll of the Cedar City, Utah, Indians, or (f) Southern Paiute Indians whose names or the name of a lineal ancestor appears on the January 1, 1940, census roll of the Las Vegas Colony, Nevada, or (g) Indians living elsewhere who can establish Southern Paiute lineal descent to the satisfaction of the Secretary of the Interior: Provided, however, That no enrollee shall have elected or shall elect to participate in the judgment awarded by the Indian Claims Commission in its dockets numbered 31, 37, 80, 80-D, and 347, granted to "Certain Indians of California" or in dockets numbered 351 and 351-A granted to the Chemehuevi Tribe of Indians. Any person qualifying for enrollment as a member of more than one of the named Indian groups shall elect which group he shall be enrolled for the purpose of this Act.

Sec. 2. Applications for enrollment must be filed with the Area Director, Bureau of Indian Affairs, Phoenix, Arizona, in the manner and within the time limits prescribed by the Secretary for that purpose. The Secretary's determination on all applications for enrollment shall be final.

Sec. 3. The cost of preparing the Southern Paiute Indian roll, and of disposing of the judgment funds, and the deduction of attorneys' fees and expenses and the cost of litigation, shall be deducted from the judgment fund. The balance of said fund, together with accrued interest, shall be apportioned by the Secretary of the Interior among the groups of persons entitled to enrollment on the Southern Paiute Indian roll as provided in section 1 of this Act. Apportionment among said groups shall be on the ratio that the number of enrollees in each group shall bear to the total number enrolled on the Southern Paiute Indian roll.

Sec. 4. The total amounts apportioned to the groups enrolled in section 1 (b) and (c) shall be redeposited in the Treasury of the United States to the credit of the respective bands, and may be advanced, expended, invested, or reinvested in any manner authorized by the governing body and approved by the Secretary.

Sec. 5. The funds apportioned to those Southern Paiute Indians enrolled under sections 1 (f) and (g) shall be available for distribution in equal shares to the enrollees except as provided in section 6 of this Act.

Sec. 6. Sums payable to enrollees or their heirs or legatees who are less than twenty-one years of age or who are under a legal disability shall be paid in accordance with such procedures as the Secretary determines will best protect their interests, including the establishment of trusts.

Sec. 7. All funds, including interest, of the adult members of any group enrolled pursuant to sections 1 (d) and (e) of this Act may be advanced, expended, invested, or reinvested in any manner pursuant to a plan agreed upon between the governing body thereof or by the members thereof, at a meeting called in accordance with rules approved by the Secretary of the Interior, and the Board of Indian Affairs of the State of Utah, subject, however, to the previous approval of such plan by the Secretary of the Interior. However, the Secretary of the Interior shall not be charged with any responsibility in the administration of the funds.

Sec. 8. No part of the per capita distributions made under authority of this Act shall be subject to Federal or State income tax.

Sec. 9. The Secretary is authorized to prescribe rules and regulations to carry out the provisions of this Act.

2. First paragraph of section 2 of the Indian Claims Commission Act, 25 U.S.C. 70a:

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission . . . .

3. Section 22 of the Indian Claims Commission Act, 25 U.S.C. 70u:

(a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of final judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with this chapter shall forever bar any further claim or demand against the Untied States arising out of the matter involved in the controversy.

STATEMENT OF THE CASE

Petitioners brought this class action in the Federal District Court for Utah to recover money damages based on their exclusion from a share in the Southern Paiute Judgment Fund caused by the failure of the Secretary of the Interior to give adequate notice of the Fund's existence and the procedure for claiming a share. The statute most directly at issue is the Southern Paiute Judgment Distribution Act (SPJDA), Pub.L. 90-584, 82 Stat. 1147 (1968), ante at pp. 2-3 . Jurisdiction was grounded on the Tucker Act, 28 U.S.C. 1346(a)(2).

On defendants' motion, the District Court dismissed based on lack of subject matter jurisdiction, sovereign immunity, and failure to state a claim. A. p. la infra. The Court of Appeals determined that the Tucker Act authorizes recovery if plaintiffs alleged a cause of action against the United States for money damages. But the Court held that plaintiffs had not alleged a

valid cause of action and affirmed the dismissal on this basis. A. p. 14a infra.

The fund at issue arose from a 1965 judgment of the Indian Claims Commission in favor of the Southern Paiute Nation of Indians for $7,253,165.19. The claim had been filed with the Commission in 1951. On April 30, 1965, Congress appropriated the fund to satisfy the judgment. Pub.L. 89-16, 79 Stat. 108. The fund was thereafter administered by the Secretary of the Interior until distributed in 1970. Plaintiffs claim that the Secretary's obligation in handling the fund was that of a trustee.

The crux of this dispute is the manner in which the fund was distributed by the Secretary. The Southern Paiute Nation, although the sole named plaintiff before the Indian Claims Commission, has never been a unitary political body. The Southern Paiute people have always lived as small, widely scattered and independent bands in the desert regions of the southern Great Basin. Their original lands were seized by the United States without treaty of cession or any compensation over a period of about forty years in the late nineteenth century. Subsequently small federal reservations were set aside for some bands, some individuals resided on the reservations of other tribes, others received public domain allotments, and many existed as squatters outside federal

Indian lands. Some of the federal reservations were "terminated" in 1957. 25 U.S.C. 741-760. Most of the Southern Paiute people have remained in remote areas, knowing little English and having few contacts with urban America.

This history is reflected in the terms of the SPJDA itself. The Act (ante at pp. 2-3) provided for distribution to three bands associated with continuing federal reservations, to four bands associated with "terminated" reservations, to members of a State of Utah sponsored group at Cedar City, Utah, and to all other Indians "who can establish Southern Paiute lineal descent to the satisfaction of the Secretary." Plaintiffs are in the latter category as are the persons on whose behalf they sued. They claim (and have had no opportunity to prove) that the class they represent constitutes the majority--possibly a very large majority[1/] -- of Southern Paiute Indians, alomost all of whom were excluded from the distribution by the Secretary's wrongful actions.

1/ A 1974 federal publication gave the combined population of the three federal reservations as 393 and the population of the Cedar City group's state reservation at 450. Federal and State Indian Reservations and Indian Trust Areas (U.S. Dept. of Commerce 1974). No figures for the terminated bands were listed. Distribution in 1970 was actually made to 1,157 persons. The original complaint in this action was filed by 1,337 named plaintiffs in the excluded class. Plaintiffs now believe that the class numbers at least 2,000 and possibly 3,000 or more.

The seven named plaintiffs reside in remote rural locations. Six are full blood Southern Paiute Indians, one is part Southern Paiute. None of them had notice of the existence of "their" claim in the Indian Claims Commission, of the hiring of "their" lawyers, of the settlement of "their" case, or the enactment of the SPJDA. They first learned of all of these events because of publicity about the actual payments to the lucky few.

Plaintiffs also claim and are ready to prove that the Interior Department knew that most Southern Paiute Indians were not associated with any organized band, lived in remote areas, and had limited knowledge of English. Nevertheless the Department communicated the existence of the judgment and of the procedures to claim a share only to selected persons. The governing bodies of the reservation bands were notified, and newspaper notice was published in such large cities as Las Vegas, Phoenix, Salt Lake City, and Denver. No effort whatsoever was made to notify most rural Paiutes, even though the names and addresses of many were known to the Department. The notice effort clearly and deliberately favored city dwellers and the few members of bands with reservations. It favored assimilated people who read English. As a result, more than half the persons Congress designated to share in the fund did not

learn of its existence or of the method to claim a share during the short, six month period allowed for application. The Secretary's failure was the more egregious, because as Congress specifically recognized in the SPJDA some eligible persons were minors or mental incompetents. SPJDA § 6.

REASONS FOR GRANTING THE WRIT

A. The Secretary's Actions Thwarted the Intent of Congress

Section 1 of the SPJDA directed the Secretary to "prepare a roll of all persons who . . . can establish Southern Paiute lineal descent." The Secretary's delegates deliberately executed the statute in a manner which omitted from any chance of enrollment virtually all persons in the quoted category, more than half the eligible Indians. Most of these Indians lived in remote rural areas and had no knowledge of the claims case, the judgment, or the enrollment for distribution.

The purpose of the claims judgment was to do final justice for the wrongful taking of tribal lands. The Indian Claims Act is intended to be "a full discharge of the United States of all claims and demands" based on land takings, including actions tainted with "fraud, duress, unconscionable consideration, . . . mistake" and of all "claims based upon fair and honorable

dealings." 25 U.S.C. 70a, 70u(a). The claims judgment purports to be a "final determination" which "shall forever bar any further claim or demand against the United States" arising out of pre-1946 land takings. 25 U.S.C. 70u(b). The Interior Department's execution of the SPJDA has left it far short of Congress's purpose.

B. Plaintiffs Have a Cause of Action for Damages.

Defendant United States has not seriously opposed the claim that the Interior Department failed to carry out the purposes of Congress. Rather, it has argued that the Secretary's failings do not give rise to a monetary claim against the Government, so the wrong is without any remedy. This contention is not consistent with applicable law.

The requirement for a monetary cause of action against the United States is that the laws "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." United States v. Testan, 424 U.S. 392, 400 (1976), quoting Eastport S.S. Corp. v. United States, 373 F.2d 1002, 1009 (Ct.Cl. 1967). This standard is clearly met here. The congressional purpose in the Indian Claims Commission Act, the 1965 appropriations act, and the SPJDA was to pay money compensation to the

Southern Paiute people for the wrongful seizure of their lands, and thus to bar any future claims by them. More than half of the Southern Paiute people were never informed of any of those laws and learned of them only after enrollment closed. Plaintiffs are persons whom Congress directed be paid a share of the judgment fund. Bureaucratic wrongdoing deprived them of any chance to receive that which Congress directed.

In United States v. Testan, supra, the Court held that the existence of an alternative remedy for statutory violations bears on whether a claim for damages lies. 424 U.S. at 403-04. Unlike that case, plaintiffs here manifestly had no other remedy. Since the sole purpose of the statutes was to pay them money for taking their lands, no equitable remedy can give them any relief. Once the fund had been distributed without notice, there was nothing to enjoin or declare.

C. Trust Principles Control.

Federal Indian statutes have long been construed based on the premise that Congress intends to deal fairly and honorably with dependent Indian people. See, Squire v. Capoeman, 351 U.S. 1, 8-10 (1956). Doubts or ambiguities are resolved in favor of the Indians. Bryan v.

Itasca County, 426 U.S. 373, 392 (1976). Statutes are liberally construed to carry out their purposes in a generous and just manner. Choate v. Trapp, 224 U.S. 665, 675 (1912).

Where Indian land and money are concerned, the duties of government officials controlling them have long been determined by the standards of the common law of trusts. See, United States v. Mason, 412 U.S. 391, 398-99 (1973); 25 U.S.C. 151-165; 31 U.S.C. 725s(a)(20); Note, Indian Tribal Funds 27 Hast.L.J. 519 (1975). In Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942), the Court held the United States liable as a fiduciary for payments intended for individual Indians paid instead to corrupt tribal officials. The Court said:

> [T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people . . . Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its

> conduct, as disclosed in the acts of those who represent it in dealings with the Indians should therefore be judged by the most exacting fiduciary standards.

When these settled rules of construction are applied to the statutes and actions at issue here, it is evident that plaintiffs cannot be left without a remedy. Statutes intended to compensate plaintiffs monetarily cannot be emasculated by the Secretary without any recourse.

CONCLUSION

The purpose of Congress to make fair restitution for wrongful seizures of plaintiffs' land has been violated by administrative lawlessness. The court below determined that the law provides no remedy, a gross injustice which this Court should correct. The writ of certiorari should be granted.

Respectfully submitted,

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December 1979

APPENDIX

OPINIONS BELOW

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

CHLOE WHISKERS, et al., Plaintiffs, vs. THE UNITED STATES OF AMERICA, ROGERS C. B. MORTON, individually and as Secretary of the Interior of the United States; MARVIN FRANKLIN, individually and as Assistant to the Secretary of the Interior for Indian Affairs, Defendants.	ORDER GRANTING DEFENDANTS' MOTION TO DISMISS C-314-73

I. Historical Background

The genesis of the present action was litigation instituted before the Indian Claims Commission ("ICC") in January, 1951, to recover just compensation for the Government's alleged wrongful taking of land that originally belonged to the Southern Paiute Nation of Indians. The ICC heard testimony in the matter at intervals until

1965 when the Government stipulated to a settlement before the ICC of $7,253, 165.19 to be distributed to the Southern Pauite Nation. To distribute this judgment, which Congress had previously appropriated (79 Stat. 81, 108, 109), Congress enacted the Southern Pauite Judgment Distribution Act, 82 Stat. 1147 (1968) ("SPJDA"). Section 9 of the SPJDA authorizes the Secretary of the Interior to promulgate regulations for the enrollment of the participants and distribution of the judgment fund. 24 C.F.R. §§ 41.3 (1)(1)-(4) (1976). Section 1 of the SPJDA required the Secretary of the Interior to prepare a roll of all eligible persons. Section 2 provided that:

> "Applications for enrollment must be filed with the Area Director, Bureau of Indian Affairs, Phoenix. Arizona, in the manner and within the time limits prescribed by the Secretary for that purpose. The Secretary's determination on all applications for enrollment shall be final."

To satisfy this directive, the Secretary's regulations required applications for enrollment to be filed in the appropriate regional office of the Bureau of Indian Affairs no later than June 30, 1969. 25 C.F.R. § 41.3 (1)(4) (1976). While the parties raise factual issues of the Secretary's

good faith efforts to enroll all eligible indiyiduals, the final roll listed 1,157 persons to whom the judgment fund was distributed, until exhausted, in per capita shares.

II. Procedural Background to the Defendant's Motion to Dismiss

The plaintiffs' third amended complaint, filed May 3, 1976, alleges the following causes of action: (1) breach of that statutory trust created by the SPJDA, Public Law 90-584; (2) breach of inherent trust obligations and fiduciary duties owed to the plaintiffs; (3) violation of plaintiffs' statutory rights to receive timely notice to file an application to participate in the distribution of the judgment fund; (4) an unconstitutional taking of private property for public use without just compensation; and (5) deprivation of property without due process of law because of lack of timely notice of plaintiffs' rights to enroll for the distribution.

The defendants moved to dismiss the plaintiffs' third amended complaint on August 6, 1976, on the following grounds:

(1) the SPJDA, contrary to the plaintiffs' third cause of action, did not create a substantive right for money damages that is enforceable against the United States under the Tucker Act, 28 U.S.C.A. § 1346(a)(2) (1976);

(2) contrary to the plaintiffs' fourth and fifth causes of action, the plaintiffs have no property right of which they have been deprived without just compensation or procedural due process;

(3) the plaintiffs' claim, if any, sounds in tort rather than as an unconstitutional "taking" of property without just compensation, and should therefore be brought, if at all, pursuant to the Federal Tort Claims Act;

(4) contrary to the plaintiffs' first and second causes of action, and even assuming that the Government breached a trust obligation to the plaintiffs in distributing the judgment fund, Congress has not expressly waived sovereign immunity for breach of trust under the present circumstances; and

(5) the plaintiffs fail to state a claim upon which relief can be granted.

On September 27, 1976, the plaintiffs filed a memorandum in opposition to the defendants' motion to dismiss on the following grounds: (1) the Tucker Act confers jurisdiction on this court for the defendants' breach of the trust relationship with the plaintiffs; and (2) the SPJDA creates a substantive right for money damages against the Government that is enforceable under the Tucker Act.

The defendants filed a reply memorandum on November 17, 1976, to which the plaintiffs

responded on January 12, 1977. The court is fully advised of the facts and the law presented by both parties on the defendants' motion to dismiss and is prepared to rule on the motion.

III. Issues Presented and Discussion

The issue before the court is whether this court may exercise jurisdiction under the Tucker Act, 28 U.S.C.A. § 1346(1)(2) (1976), over these five causes of action. The Tucker Act grants jurisdiction to this court over five types of actions:

> "The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
> . . . .
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidaged damages in cases not sounding in tort."

The plaintiffs contend that the first and third causes of action are founded upon an Act of Congress, the SPJDA, and that the fourth and fifth causes of action are founded upon the Constitution. The second cause of action, as the plaintiffs contend, is premised on a "judicially recognized"

trust relationship for whose breach an action will lie as an action "for liquidated or unliquidated damages in cases not sounding in tort" under the Tucker Act.

Whether the first and third causes of action are cognizable under the Tucker Act depends upon the extent to which the SPJDA creates "a substantive right to recover money damages from the United States." United States v. Testan, 424 U.S. 392, 398 (1976). Since the Tucker Act is jurisdictional, the plaintiffs must demonstrate that the SPJDA expressly waives sovereign immunity, see United States v. Sherwood, 312 U.S. 584, 586 (1941), in that the SPJDA "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." Eastport Steamship Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967), cited with approval, United States v. Testan, supra at 400.

To sustain the burden that the SPJDA created a substantive right to recover money damages against the United States, the plaintiffs must prove that (1) a trust relationship is, in fact, created by that legislation, and (2) having found a trust relationship, the SPJDA mandates that the Government compensate plaintiffs for a breach of that trust. The plaintiffs argue that the SPJDA creates a trust relationship between the

United States and the plaintiffs merely because the judgment fund is held in the United States Treasury prior to distribution. The United States allegedly acts as a trustee of the judgment fund and must exercise the fiduciary obligations inherent in that position. The statutory language does not support the plaintiffs' contention. The SPJDA does not purport to create a trust relationship between the Government and the Indians, as the Congress has expressly done in other legislation. See, e.g., United States v. Mason, 412 U.S. 391, 393 (1973); Seminole Nation v. United States. 316 U.S. 286, 289 (1942); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252, 256 & n.4 (D.D.C. 1972). The Act provides in Section 6 that the Secretary may protect the interests of enrollees under 21 years of age through such devices as will "best protect their interests," including the "establishment of trusts." Section 7 specifically disavows any congressional intent to impose trust or fiduciary obligations on the Secretary of the Interior when the Secretary allows adult enrollees to invest their portion of the fund. The court's finding recognizes that certain funds can be, and have been, held in trust for distribution to the tribe or to individual Indians, but the SPJDA does not create such a distribution scheme.

Failing to prove that a trust relationship was created, the court need not consider whether the SPJDA created a substantive right for money damages against the United States, although the court doubts that the statutory language would support that conclusion even if a trust were found to exist. As the defendants argue, and as the United States Supreme Court agrees, "there cannot be a right to money damages without a waiver of sovereign immunity, and we regard as unsound the argument of amici that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation." United States v. Testan, supra at 400-01.

To succeed on the fourth and fifth causes of action, the plaintiffs must prove that they enjoyed a property right in the judgment fund cognizable under the Fifth Amendment. If plaintiffs have such a property right, they cannot be deprived of that right without just compensation or without procedural due process under the Fifth Amendment. While the plaintiffs may have possessed an expectancy to participate in the distribution of that fund, the issue before the court is whether the property right had vested in the plaintiffs so that they were entitled to the protections of the Fifth Amendment. Prior to a property right vesting in

the individual, Congress has "broad authority" to alter the distribution scheme and manage the funds allocated to the tribe. Delaware Tribal Business Committee v. Weeks, 45 U.S.L.W. 4202, 4205 (U.S. Feb. 23, 1977). In light of that broad authority, Congress did not unconstitutionally deprive the original class of intended beneficiaries of property without just compensation by expanding the class of tribal beneficiaries entitled to share in royalties from tribal lands. United States v. Jim 409 U.S. 80, 82-83 (1972). See also Gritts v. Fisher, 224 U.S. 640, 647-48 (1912). Nor did Congress violate the Fifth Amendment by devoting mineral rights to tribal use that would otherwise have gone to individual allottees at a future date. Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 654-56 (1976).

In the present case, Congress authorized the Secretary of the Interior to promulgate regulations to govern the manner and the time limits for participation in the distribution of the judgment fund and declared that "[t]he Secretary's determination on all applications for enrollment shall be final." Prior to final enrollment, the expected participants in the distribution had no vested rights. See, e.g., Klamath & Modoc Tribes v. United States, 436 F.2d 1008, 1021 (Ct.Cl.), cert. denied, 404 U.S. 950 (1971) ("Even in the

absence of such a statutory provision, the rule is well settled that no individual vested rights are normally created in Indians until promulgation of the final roll."); Choctaw Nation v. United States, 100 F.Supp. 318, 320 (Ct.Cl.) cert. denied, 343 U.S. 955 (1951) ("The cases clearly establish the rule that before the closing of the citizenship rolls, no property of any kind has vested in the members of the tribe as individuals but was still in the tribe. . . .").

Even after promulgation of the final roll, Congress may add a group of individuals who, for whatever reason, were not initially enrolled to carry out congressional intent to make a complete and accurate enrollment. See Choctaw Nation v. United States, supra at 324-25. This remedy must proceed from Congress, which it could do to remedy the present circumstances, and not from the Secretary of the Interior, so long as the Secretary has complied in good faith with the implementation of the congressional distribution scheme as originally authorized. As stated in Choctaw Nation v. United States, supra at 325:

> "The power of revision and correction which was in the Secretary of the Interior until March 4, 1907 . . . ended with the closing of the rolls on that date. The power of changing the requirements for membership and enrollment which was in Congress pursuant to the Atoka Agreement,

> came to an end also on March 4, 1907. But the obligation of Congress to place upon the tribal roll those members of the tribe who were entitled to be thereon under the standards as they existed in 1907, did not end with the closing of the roll in 1907. Congress was as much obligated to the forty-one members of the tribe who met those standards as it was to the Choctaws who were on the rolls in 1907, and we think it had the power to correct the error or ommission by placing the forty-one persons on the rolls in 1914."

The plaintiffs were required to comply with the enrollment procedure as congressionally authorized and as implemented by the Secretary of the Interior in his regulations. The plaintiffs, having failed to enroll within the time limits set by the Secretary, have no vested property right of which they can be deprived without just compensation or without procedural due process under the Fifth Amendment. Congress can require compliance with its distribution scheme. Failure to comply with the regulations governing enrollment, which were promulgated under Congress's broad authority to manage and distribute the judgment funds, jusitfies exclusion from participation in the distribution without violating the Fifth Amendment. Cf. Delaware Tribal Business Committee v. Weeks, supra. The plaintiffs' fourth and fifth

causes of action, not being founded on the Constitution, must be dismissed for lack of jurisdiction under the Tucker Act.

The plaintiffs' second cause of action is premised upon a breach of trust and of fiduciary obligations, which purportedly arise through the relationship of the Federal Government to the Indian tribe when a judgment fund is held in the United States Treasury. This cause of action for breach of trust allegedly exists independently of any statutory trust that may have been established by the SPJDA. As this court stated in its order filed December 27, 1974, the relevant jurisdictional inquiry under the Tucker Act is whether that Act comprehends jurisdiction for a breach of trust. The plaintiffs have argued that breach of that trust relationship existing between the Government and the plaintiffs confers jurisdiction on this court, but the cases on which they base their argument derive jurisdiction from special jurisdictional statutes passed by Congress to remedy specific injustices. See, e.g., Seminole Nation v. United States, 316 U.S. 286, 289 & n.2 (1942); Navajo Tribe of Indians v. United States, 364 F.2d 320, 322 & n.1 (Ct.Cl. 1966). The plaintiffs cite other cases for breach of trust on which the jurisdiction is not explicit and on which the parties disagree as to whether jurisdiction

was exercised pursuant to a special jurisdictional act or the Tucker Act. See United States v. Mason, 412 U.S. 391 (1973); Cheyenne-Arapahoe Tribes of Indians v. United States, 512 F.2d 1390 (Ct.Cl. 1975). In the court's order of December 27, 1974, Manchester Band of Pomo Indians, Inc. v. United States, 363 F.Supp. 1238, 1242 (N.D. Cal. 1973), was the only case of precedential value to the jurisdictional issue of a breach of trust under the Tucker Act.

Courts must find express waiver of sovereign immunity before assuming jurisdiction over a damage claim against the Government. See, e.g., United States v. Testan, supra at 399-400; Affiliated Ute Citizens v. United States, 406 U.S. 128, 141-42 (1972); Harkins v. United States, 375 F.2d 239, 242 (10th Cir. 1967). As the Court stated in United States v. Sherwood, supra:

> "The United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."

Id. at 586. This court has, therefore, determined that a breach of trust does not fall within this court's jurisdiction under the Tucker Act. Wherefore, the court having no jurisdiction over any of the plaintiffs' five causes of action,

IT IS HEREBY ORDERED that the defendants' motion to dismiss is granted.

DATED this 21 day of March, 1977.

/s/ ALDON J. ANDERSON
United States District Judge

Opinion of the Court of Appeals
600 F.2d 1332 (10th Cir. 1979)

Chloe WHISKERS, Annie Cantsee, Velma Mills, James Mills, Marshall Whyte, Raymond Steward Hatch and Anna Marie Nat, Plaintiffs-Appellants,

v.

UNITED STATES of America, Cecil Andrus, Secretary of the Interior, and Forrest Gerard, Assistant Secretary of the Interior for Indian Affairs, Defendants-Appellees.

Quinault Allottees Association, Amicus Curiae,

No. 77-1620.

United States Court of Appeals, Tenth Circuit.

Argued Sept. 29, 1978.

Decided June 14, 1979.

Rehearing Denied Aug. 14, 1979.

Before McWILLIAMS, McKAY and LOGAN, Circuit Judges.

McKAY, Circuit Judge.

This litigation arises out of a settlement between the United States and the Southern Paiute Nation to compensate the latter for the taking of aboriginal homelands in southern Utah and northern Arizona.[1] In 1965 Congress appropriated more than seven million dollars to pay the settlement sum. Second Supplemental Appropriations Act, Pub.L. No. 89-16, tit. IV, 79 Stat. 108 (1965) (the Appropriation Act).[2] The Southern Paiute Judgment Distribution Act. Pub.L. No. 90-584, 82 Stat. 1147 (1968) (the Distribution Act) was enacted three years later to provide for distribution of the judgment fund.

The Distribution Act directed the Secretary of the Interior (the Secretary) to prepare a roll of all persons who met the requirements of membership in six specified groups or categories of Southern Paiutes. Applications for inclusion

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1. The settlement was stipulated to before the Indian Claims Commission.

2. Title IV of Pub.L. No. 89-16 appropriated money "[f]or payment of claims . . . as set forth in Senate Document Numbered 19, Eighty-ninth Congress and House Document Numbered 113, Eighty-ninth Congress." The House Document referred to seven Indian Claims Commission awards, including the instant one in favor of "The Southern Paiute Nation et al." H.R. Doc. No. 113, 89th Cong., 1st Sess. 15 (1965).

on the roll were required to be filed in the manner and within the time limits prescribed by the Secretary, whose determination on all applications was to be final. After deducting expenses, the Secretary was directed to apportion the remainder of the fund among the six groups of persons entitled to enrollment.

Regulations promulgated by the Secretary pursuant to the Distribution Act repeat the eligibility requirements outlined in the act and further require that applications for enrollment be postmarked by June 30, 1969. 25 C.F.R. § 41.3(1)(1)-(4) (1978).

Plaintiffs brought this suit for damages in federal district court contending that the United States made inadequate attempts to enroll eligible persons residing in remote areas, which caused plaintiffs and the class they represent to fail to receive their rightful shares of the settlement. Plaintiffs' district court complaint, as amended, denominated five causes of action:

> (1) breach of a trust created by the Distribution Act and regulations promulgated thereunder;
>
> (2) breach of a trust created by general federal Indian statutes, regulations and judicial decisions;
>
> (3) breach of statutory duties established by the Distribution Act;

> (4) taking of property without just compensation, in violation of the Fifth Amendment; and
>
> (5) deprivation of property without due process of law.

Plaintiffs asserted that the district court had jurisdiction over these claims by virtue of a provision of the Tucker Act, 28 U.S.C. § 1346 (a) (1976), which provides:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> . . . . . .
>
> (2) Any . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The district court concluded that its Tucker Act jurisdiction did not extend to any of the claims alleged in plaintiffs' complaint. The court was of the view that the Distribution Act did not establish a trust or create other substantive rights in the plaintiffs that were enforceable

under the Tucker Act, and accordingly dismissed the first and third causes of action. The second cause of action was dismissed on the ground that an action for breach of trust was beyond the district court's Tucker Act jurisdiction. The court further concluded that plaintiffs did not enjoy a property right in the judgment fund cognizable under the Fifth Amendment and therefore dismissed the fourth and fifth causes of action. Whether dismissal of plaintiffs' complaint as to each of these claims was proper is the only issue on appeal.

I.

We begin our review of the trial court's disposition by noting that through the Tucker Act the United States has consented to be sued in the district courts and the Court of Claims for money damages arising out of certain specified circumstances. 28 U.S.C. §§ 1346(a)(2), 1491 (1976). See United States v. Sherwood, 312 U.S. 584, 590, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); International Engineering Co. v. Richardson, 167 U.S.App.D.C. 396, 512 F.2d 573, 577 (1975), cert. denied, 423 U.S. 1048, 96 S.Ct. 774, 46 L.Ed.2d 636 (1976); Pasha v. United States, 484 F.2d 630, 633 (7th Cir. 1973); Konecny v. United States, 388 F.2d 59, 62 (8th Cir. 1967). However, the act itself does not provide any substantive rights enforceable

against the United States in a suit for damages; it merely confers jurisdiction whenever such a substantive right falling within the categories enumerated in the Tucker Act otherwise exists, United States v. Testan, 424 U.S. 392, 398, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). It is not enough that a complaint contain allegations comporting with Tucker Act claim categories. The Supreme Court in Testan made it clear that before a court may hear a Tucker Act claim against the United States, it must first determine that some "federal statute[3] 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" 424 U.S. at 400, 96 S.Ct. at 954 (quoting Eastport Steamship Corp. v. United States, 178 Ct.Cl. 599, 372 F.2d 1002, 1009 (1967)).

Since plaintiffs' claims are premised on the Constitution, federal statutes, and executive regulations, they are within the specific categories enumerated in the Tucker Act. Inasmuch as the Disbution Act gave plaintiffs the right to share in the judgment proceeds,[4] the controlling question is

3. For purposes of this determination, an "authorized regulation" is the equivalent of a statute. See United States v. Hopkins, 427 U.S. 123, 128, 96 S.Ct. 2508, 49 L.Ed.2d 361 (1976) (per curiam).

4. Plaintiffs all claim to be within the sixth category of Southern Paiutes listed in the Distribution Act. This category consists of "Indians living [other than in previously mentioned areas] who can establish Southern Paiute lineal descent to the satisfaction of the Secretary of the Interior." Pub.L. No. 90-584, § 1(g), 82 Stat. 1147.

whether federal law mandates compensation for damages plaintiffs may have sustained because of the Secretary's actions in derogation of their rights.

II.

Our analysis of the question focuses first on the breach of trust claims. At the outset we express our full agreement with plaintiffs' contention that a legislative declaration of trust status for a particular fund is itself a congressional mandate, fully consistent with the Testan-Eastport standard discussed above, that the United States assume financial responsibility for its failure adequately to perform its fiduciary obligations.[5] Liability on the part of a trustee for breach of his fiduciary duties is inherent in a trust relationship. Unless it appeared affirmatively that Congress meant to create something less than a trust relationship when it used the term "trust" in referring to a particular fund, we would necessarily assume that

5. We do not believe Testan requires that Congress expressly state that damages are recoverable before jurisdiction under the Tucker Act will lie. See Mitchell v. United States, 591 F.2d 1300, 1302 (Ct.Cl. 1979). The Eastport decision noted that the right to monetary recovery could be granted "expressly or by implication." 178 Ct.Cl. 599, 372 F.2d at 1007.

Congress intended to establish nothing less than a valid trust -- complete with fiduciary duties and concimotant financial liability for their breach. That congressional creation of a trust relationship itself mandates compensation for damages sustained from breach of that trust has recently been recognized by the Court of Claims in a decision involving amicus Quinault Allottees Association. See Mitchell v. United States, 591 F.2d 1300, 1302 (Ct.Cl. 1979).[6]

While we accept plaintiffs' basic jurisdictional premise, we cannot agree that Congress in any way indicated that the judgment fund in question was to be held in trust pending distribution or that the Secretary was to act as a trustee in distributing the fund.

The Appropriation Act did not indicate that the fund would be held in trust pending

6. The conclusion that the Tucker Act provides a jurisdictional basis for claims alleging breach of a congressionally created trust is by no means novel. In United States v. Mason, 412 U.S. 391, 93 S.Ct. 2202, 37 L.Ed.2d 22 (1973), the Supreme Court reversed a Court of Claims determination that the United States, acting as trustee, had breached its fiduciary responsibilities with respect to Indian property. The Court did not, however, question the Court of Claims' conclusion that the Tucker Act was a proper jurisdictional basis for bringing such a claim. See 412 U.S. at 394 n. 5, 93 S.Ct. 2202.

distribution. See Pub.L. No. 89-16, tit. IV, 79 Stat. 108. Neither did the Distribution Act.[7] See Pub.L. No. 90-584, 82 Stat. 1147. Plaintiffs refer to several statutes concerning trusts, but none has applicability to the fund in question. E.g., 25 U.S.C. § 160 (1976) (concerning stocks, bonds, and other securities held by the Secretary for certain Indians on June 10, 1876); 25 U.S.C. § 161 (1976) (Secretary authorized to deposit into the Treasury certain funds held by him as trustee on April 1, 1880); 31 U.S.C. § 547a (1976) (investment procedure for trust funds).

Plaintiffs place substantial reliance on 31 U.S.C. § 725s(a)(20) (1976),[8] contending it declares that the judgment fund, while held in the Treasury pending distribution, was held in trust. At first blush, the section does appear to have the

7. The only express mention in the Distribution Act of a trust relationship is in section 6. That section merely authorizes the Secretary to establish trusts in favor of individual enrollees under certain circumstances:

> Sums payable to enrollees or their heirs legatees who are less than twenty-one years of age or who are under a legal disability shall be paid in accordance with such procedures as the Secretary determines will best protect their interests, including the establishment of trusts.

8. This provision was enacted by the Permanent Appropriation Repeal Act of 1934, Pub.L. No. 73-473, § 20 Stat. 1233.

effect plaintiffs attribute to it. Although the government inexplicably makes no attempt to refute the claimed significance of the section, our independent research leads us to conclude that the section does not have the sweeping meaning that a simple reading of it might indicate.

Section 725s provides:

> (a) The funds appearing on the books of the Government and listed in subsections (b) and (c) of this section shall be classified on the books of the Treasury as trust funds . . . .
>
> . . . . . .
>
> (20) Indian moneys, proceeds of labor, agencies, schools, and so forth (5t301).

The key to understanding the scope of subsection 20 is found in the rather cryptic parenthetical notation "(5t301)." This notation refers to the particular Treasury account to which the specified funds were credited. 78 Cong.Rec. 8242 (1934) (remarks of Rep. Griffin). The funds so credited were described as follows:

> This fund covers deposits in the Treasury of the United States of proceeds of pasturage and sales of timber, coal or other products and miscellaneous revenues of any Indian reservation, except those of the Five Civilized

Tribes, and not the result of the labor of any one member of a tribe.

Hearing on H.R. 9410 Before the Subcomm. on Permanent Appropriations of the House Appropriations Comm., 73d Cong., 2d Sess., 255 (1934). The Chief Finance Officer of the Indian Service further explained:

> In the negotiation of the treaties with the several tribes of Indians, tracts of land were set aside for agencies, schools, and administrative purposes. Frequently the Indians were compensated in some way for the land so held. The title to the land is vested in the United States. There were set aside anywhere from 160 to 640 acres of land, all of which is not needed. Some of that land may be leased for grazing purposes, the agency may operate a farm on it, or the land may be put to some other use. The revenue derived from that land comes in, not to the credit of the tribe, but is taken up in the account as "Indian Moneys, Proceeds of Labor," and is available for expenditure by the several schools or agencies.

Id. at 258 (testimony of Mr. Dodd).

It is clear that this provision dealt only with a narrow range of "Indian moneys," and not with all funds that might be so described. It is equally clear that funds appropriated in settlement of claims brought before the Indian Claims Commission are not within that narrow range. It follows that this section provides no basis for concluding that the judgment proceeds were held in trust at the time they were distributed by the Secretary.

Plaintiffs advance the further argument that an analysis of the existing body of law and regulations applicable to Indians, taken as a whole, supports the conclusion that the relationship of the United States to its Indian citizens is in the nature of a trust. This point is not without some appeal and, indeed, it is entirely accurate as a general proposition. But this characterization simply does not satisfy the Testan-Eastport requirement of a specific congressional mandate to compensate those injured by the violation of some substantive right.

For the reasons outlined in this opinion, we agree that plaintiffs' breach of trust claims were properly dismissed.[9] In so deciding, we are

9. The parties devote some attention to 28 U.S.C. § 1346(a)'s grant of jurisdiction over claims against the United States "for liquidated or unliquidated damages in cases not sounding in tort." Even assuming an action for breach of

not unmindful of language in Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390, 1392 (Ct.Cl. 1975), "that funds appropriated to Indians to satisfy judgments of the Indian Claims Commission or of [the Court of Claims], as well as funds produced by tribal activities, are, when kept in the Treasury, held in trust for the Indians." The Cheyenne-Arapaho case involved several types of trust funds, including two held by the Southern Ute Tribe which were derived from an Indian Claims Commission award. That case is readily distinguishable from this one, however, in that specific congressional legislation declared the funds

9 cont'd. trust fits within this category of claim -- which it certainly seems to do -- appellants must still demonstrate the existence of the requisite congressional intention that monetary compensation be available for violation of a substantive right. We have stated that congressional establishment of a trust itself satisfies this requirement for claims based on breach of that trust. No such establishment of a trust has been demonstrated by plaintiffs in this case.

This problem may be of no more than theoretical interest in any event. Any congressional creation of a trust would be accomplished directly, by statute, or indirectly, by authorized regulation. An action for breach of that trust would therefore readily fit within the "Act of Congress" and "regulation of an executive department" prongs of the Tucker Act, making resort to the more amorphous "cases not sounding in tort" category unnecessary.

in Cheyenne-Arapaho to be held in trust.[10] In any event, insofar as the cited language in Cheyenne-Arapaho would lead us to a conclusion incompatible with the standards announced in Testan, we are unable to follow it.

Plaintiffs have also drawn our attention to two cases decided by the Court of Claims

10. 25 U.S.C. § 672, enacted in 1951, divided certain trust funds, giving a portion to the Southern Utes. That statute directed that this portion be credited to the Southern Utes' "existing" trust account established pursuant to other provisions of Title 25. When Congress ordered distribution of the Indian Claims Commission award forming the trust res at issue in Cheyenne-Arapahoe, it simply directed that the judgment share attributable to the Southern Utes be "available for use in accordance with existing authorization," including §672. 25 U.S.C. § 676a (1976). Moreover, Congress expressly referred to the Southern Utes' judgment award as constituting a trust find. Id. Thus there was present in the Cheyenne-Arapahoe case precisely what is missing in this case -- a specific congressionally created trust relationship from which a congressional mandate for compensatory damages for breach of trust can be fairly implied.

We recognize that § 676a refers to " the trust fund . . . appropriated by the Second Supplemental Appropriations Act, 1965." This act, of course, also appropriated the sum to pay the Southern Paiute award involved in the instant case. The fact that the Appropriation Act does not itself refer to trust funds being appropriated and the absence in the Southern Paiute Distribution Act of any reference to a pre-distribution trust relationship nonetheless compel the conclusion that the quoted phrase in § 676a refers only to the Ute award dealt

subsequent to its decision in Mitchell.[11] Both decisions, Duncan v. United States, 597 F.2d 1337 (Ct.Cl. 1979), and Cherry v. United States, 594 F.2d 795 (Ct.Cl. 1979), concluded that Tucker Act jurisdiction existed for breach of trust claims presented by plaintiffs in those cases.

In Cherry, the court reasoned that a statute and related regulations "envision[ed]" a trust relationship between the Air Force and missing Air Force personnel insofar as management of compensation accuring to servicemen missing in action was concerned. 594 F.2d at 799. This result was reached despite the absence of the word "trustee" in the provisions relied on. We agree that use of the word "trustee" is not absolutely essential to finding of a trust relationship when it

10 cont'd. with by that section, and not to the Southern Paiute award. Our comprehensive review of the legislative history of 676a indicates there is no basis for concluding that Congress meant to express its intention that all sums appropriated by the Appropriations Act, including those in no way expressly affected by 676a, were to be held as trust funds. In this regard, a comparison of 676a with the Distribution Act is insightful: While 676a, dealing with Southern Utes, refers to "the trust fund . . . appropriated by the Second Supplemental Appropriations Act," 1 of the Distribution Act, dealing with Southern Paiutes, refers to "the sum . . . appropriated [by that same appropriation act]." (Emphasis added.)

11. See text accompanying note 6 supra.

is otherwise clear that Congress intended a trust relationship to exist.[12] But even if the Court of Claims was correct in discerning a trust relationship in the provisions considered in Cherry, we are unable to reach a similar conclusion in the case before us. We simply do not find in the relevant statutory and regulatory provisions an enumeration of duties which would justify a conclusion that Congress intended the Secretary to be a trustee in carrying out the provisions of the Distribution Act.[13]

In Duncan, the court cited Cherry for the proposition that "Congress need not expressly

12. By the same token, as noted earlier in this opinion, mere use of the term "trust" would not necessarily justify a conclusion that an actual trust relationship had been intended by Congress. See text following note 5 supra.

13. It should be noted that a panel member dissented in Cherry, stating that a trust "cannot be implied from authorities relied upon by the court." 594 F.2d at 802. The dissent focused on the jurisdictional standards announced in Testan and Eastport (decisions curiously overlooked by the Cherry majority) and criticized the majority's use of Mitchell:

> The court has not pointed to any passage in the Missing Persons Act which creates "expressly or by implication" the statutory authorization for a trust which it required in Mitchell as the "substantive right" which mandates compensation. It is very important to note in this connection that in Mitchell the holding that the statute

use a talismanic phrase such as 'trust relationship' or 'hold in trust' in order to establish a trust relationship." 597 F.2d at 1342. However, the case was like Mitchell -- and unlike Cherry -- in that it involved a statutory provision which explicitly recognized the existence of a trust relationship. See id. at 1343.

Whether or not these cases are at variance with Testan is not clear. Insofar as they are, we of course cannot follow them. Insofar as they are not, they do not require a conclusion different from the one we have reached here.

III.

Plaintiffs' third cause of action was properly dismissed. This cause of action was based on alleged breach of statutory duties established by the Distribution ACt, independent of any trust relationship. The requisite mandate of federal compensation for damages sustained is not to be found in these provisions. See United States v. Testan, 424 U.S. at 400, 96 S.Ct. 948.

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13 cont'd. authorized suit for monetary recovery was based on an implication which derived from the statute's express declaration of a trust. It is the absence of the latter which here deprives the court of the analogy it seeks to establish. Id. at 803.

IV.

Plaintiffs' constitutional claims in counts 4 and 5 were also properly dismissed. We agree with the trial court's conclusion that plaintiffs had no constitutionally cognizable individual property rights in the undistributed fund of which they could have been deprived in violation of the Fifth Amendment. The legislative scheme for settlement of Indian Claims Commission was designed to provide relief for group claims as opposed to individual claims. See Turtle Mountain Band of Chippewa Indians v. United States, 203 Ct.Cl. 426, 490 F.2d 935, 951 (1974). We see no basis for concluding that the individuals in this case had somehow come to enjoy the individual property interests in the judgment award at the time of distribution. The Distribution Act establishes no basis for such a conclusion.[14] It provides that the fund be distributed "among the groups of persons entitled to enrollment on the Southern Paiute Indian roll." Pub.L. No. 90-584, § 3, 82 Stat. 1147 (emphasis added). Further indication that individual property interests were not intended on

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14. It is true that some other statute or regulation could serve to indicate the existence and extent of individual property interests in the judgment fund. However, we are unable to discover other provisions which so indicate.

behalf of all persons coming within the categories in the Distribution Act is seen in section 4 of the act. It provides that the judgment award shares payable to two groups of Southern Pauites, the Kaibab Band and the Moapa Band, be "redeposited in the Treasury of the United States to the credit of the respective bands," for use "in any manner authorized by the governing body [of each band] and approved by the Secretary." Id. § 4 (emphasis added). Although the distributional section applicable to plaintiffs directed distribution to individuals, the right to such an individual payment, and thus a specific property right in the judgment award, was predicated upon enrollment by the Secretary. See id. § 5. Plaintiffs were not so enrolled.

Given the variety and complexity of acts and regulations providing for distribution of judgment awards and other funds among Indians, we intentionally avoid making sweeping statements concerning the existence or scope of constitutionally significant property interests in these funds generally. We simply hold that these particular plaintiffs did not, as a matter of law, have such property interests in this particular judgment fund.

Order Denying Rehearing

July Term - August 14, 1979

(caption omitted - same as above)

This matter comes on for consideration of appellants' petition for rehearing filed July 16, 1979, in the captioned cause.

Upon consideration whereof, it is ordered that the petition for rehearing is denied.

/s/ Howard K. Phillips
Clerk